STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 17, 2014
v	No. 314076 Jackson Circuit Court
THOMAS LENDSEY CARTER, Defendant-Appellant.	LC No. 12-004268-FH

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his bench-trial convictions of two counts of first-degree child abuse, MCL 750.136b(2), and two counts of assault with intent to do great bodily harm less than murder, MCL 750.84(1)(a). He was sentenced to concurrent terms of 7 to 15 years' imprisonment for each of the child-abuse convictions and 3 to 10 years' imprisonment for each of the assault convictions. We affirm.

Defendant's convictions arise out of alleged physical abuse to his 4-month-old son, which based on the nature and extent of the injuries, were determined to have occurred on two separate occasions. Defendant first argues that the trial court erred by denying his motion for a new trial because the two verdicts regarding the older injuries the infant sustained were against the great weight of the evidence. We disagree. We review a trial court's decision to deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Additionally, we "review a properly preserved great-weight issue by deciding whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011).

"A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2). Thus, the prosecution must prove that defendant intended to cause serious harm to the infant or that he knew serious harm would be caused by his actions. See *People v Maynor*, 470 Mich 289, 295-297; 683 NW2d 565 (2004). "'Serious physical harm' means any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut." MCL 750.136b(1)(f).

"The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm *less than murder*." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (quotation marks and citation omitted); see MCL 750.84(1)(a). Intent to do great bodily harm has been defined as "an intent to do serious injury of an aggravated nature." *Brown*, 267 Mich App at 147 (quotation marks and citation omitted).

In this case, there was evidence that defendant knowingly or intentionally caused serious physical harm to the infant. Medical testimony showed that the infant had an old skull fracture and a chronic subdural hemorrhage, or old blood, on the left side of the brain. The infant's mother testified that approximately three weeks before the incident leading to hospitalization, defendant called and told her that the infant had fallen off the couch while under his care. She testified that the infant was crying and fussy that night, which was very uncharacteristic of him. She also testified that the baby was only three months old at the time and could only roll to his side. Medical testimony confirmed that the older injuries were at least three weeks old. However, due to the width of the old fracture and the size of the subdural hemorrhage, medical testimony showed that the injuries could not have been caused by a fall from a couch, even onto a cement floor, and occurred from a significant impact consistent with physical abuse. Defendant argues that he was not the only one to care for the infant, but he also testified at trial that the infant was never injured while in the care of others. The infant's mother and grandmother also testified that they did not injure the infant. Although there were different explanations as to the infant's injuries, we "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). The trial court made it clear that it did not find defendant's testimony regarding the explanation of the infant's injuries credible.

This evidence is also sufficient to show that defendant assaulted the infant with intent to do great bodily harm. Given the nature and extent of the infant's injuries, specifically the size of the old skull fracture and subdural hemorrhage, the trial court could reasonably infer the requisite intent. See *People v Howard*, 226 Mich App 528, 550; 575 NW2d 16 (1997) (noting that the nature and extent of the injuries is probative of intent).

Additionally, contrary to defendant's argument, there is no indication that the verdicts regarding the older injuries were based solely on a propensity theory, particularly where the circumstantial evidence discussed previously and its reasonable inferences establish that defendant knowingly or intentionally caused serious physical harm to the infant and assaulted the infant with intent to do great bodily harm. See *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993) ("Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of the crime.").

Defendant also makes a brief, unsupported argument that the verdicts are against the great weight of the evidence because there was no testimony regarding an exact date of the skull injury. However, MCL 767.45 indicates that the information must contain "[t]he time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense." See also *People v Dobek*, 274 Mich App 58, 82-83; 732 NW2d 546 (2007); *People v Naugle*, 152 Mich App 227, 235-236; 393 NW2d 592 (1986). Because defendant fails to provide authority that time is of the essence in child abuse cases, we need not consider this

argument. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006) (noting that a party may not leave it to this Court to search for authority to sustain or reject its position). Nevertheless, to determine whether time is of the essence for an offense, courts should consider "(1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense." *People v Miller*, 165 Mich App 32, 46; 418 NW2d 668 (1987), remanded on other grounds 434 Mich 915 (1990). Defendant does not challenge the prosecutor's efforts to pinpoint a date or argue that the lack of specificity of time prejudiced his defense. And given the nature of the offense charged in this case and the fact that the victim cannot specify a date that the crime occurred, time would not be of the essence in child abuse cases such as this. See also *Dobek*, 274 Mich App at 83 (stating that time is not of the essence in sexual abuse cases involving children). The testimony established that the injuries occurred sometime between February 2012 and March 10, 2012, which was sufficient to satisfy the time element. Therefore, the verdicts with regard to the older injuries the infant sustained were not against the great weight of the evidence, and accordingly, the trial court did not err by denying defendant's motion for a new trial.

Defendant also argues that the trial court erred by assigning 25 points for OV 3 because there was insufficient evidence that the infant sustained a life-threatening injury. We disagree. We review a trial court's factual determinations for clear error, and they must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo whether the facts are sufficient to support a particular score for an offense variable. *Id.*

We find that the record contained sufficient evidence that the infant sustained a life-threatening injury. The evidence showed that the infant sustained four skull fractures and subdural hemorrhaging, both old and new. As a result, he had burr holes placed in his skull to relieve the pressure, as well as a shunt to drain fluid to his abdomen. He suffered seizures at the hospital and is required to take two seizure medications daily, because if left untreated, the seizures would be life threatening. He is also at risk for developmental delays. Although there was testimony that the infant was doing well, he still needed the shunt and seizure medication, and given the severity of his injuries at the time that he sustained them, the trial court's determination that the infant suffered a life-threatening injury was not clearly erroneous.

Additionally, contrary to defendant's argument, although the medical testimony did not specifically state that a life-threatening injury occurred, medical testimony is not required to prove the infant suffered life-threatening injuries. See *People v McCuller*, 479 Mich 672, 697 n 19; 739 NW2d 563 (2007). Defendant fails to provide support for his assertion that there needed to be testimony specifically stating that the child had a life-threatening or permanent-incapacitating injury. Rather, the preponderance of the evidence just needs to show that the infant had a life-threatening or permanent-incapacitating injury, which as discussed, it did.

Alternatively, defendant argues that he is entitled to resentencing because defense counsel was ineffective for failing to object at sentencing to the scoring of OV 3. This issue was not properly presented for appeal because defendant did not raise it in the statement of questions presented. Thus, we need not consider it. See *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Nevertheless, we find defendant's claim lacks merit. Even if defense counsel erred by failing to object to the scoring of OV 3 at sentencing, defendant cannot show

that there is a reasonable probability that but for counsel's error the outcome would have been different, where the issue was subsequently presented to the trial court in defendant's motion for resentencing and the trial court denied the motion with very specific reasons. See *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Affirmed.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan